1901 — [illegible] — The Chancellor.

The result is that I hold that this charge (No. 6) is cog[illegible] able by this Court. As I have already said, we find that it [illegible] been proved, and that the defendant is guilty on this charge[illegible]

I desire to say that the Court is unanimous in respect o[illegible] its findings. (1)

On November 19 last the Bishop of Rochester pronoun[illegible] sentence depriving the defendant ab officio et beneficio.

Solicitors for prosecutors: *Wontner & Sons.*
Solicitors for defendant: *Sayle, Carter & Co.*

C. F. J[illegible]

C. A. 1901 Nov. 26; Dec. 16, 19.

[IN THE COURT OF APPEAL.]

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Admiralty—Collision—Limitation of Liability—Bailment—Loss of Chatt[illegible]—Negligence of Wrongdoer—Claim by Bailee against Fund in Cou[illegible]—Possessory Title as against Wrongdoer—Measure of Damage.

In an action against a stranger for loss of goods caused by his neglig[illegible] the bailee in possession can recover the value of the goods, althoug[illegible] would have had a good answer to an action by the bailor for damage[illegible] the loss of the thing bailed.

Claridge v. South Staffordshire Tramway Co., [1892] 1 Q. B. [illegible] overruled.

APPEAL by the Postmaster-General against a decision of [illegible] [illegible] Jeune P., confirming a report of the registrar disallow[illegible] a portion of a claim in respect of the contents of cert[illegible] mail bags lost in a collision.

The case raised the question as to the rights of [illegible] Postmaster-General as bailee of letters and parcels in tra[illegible] by post.

The facts were shortly as follows:—

On April [illegible] 1900, a collision occurred in a fog off Table B[illegible]

(1) With respect to the charges of drunkenness [illegible] the Court found the defendant guilty on charges 2, 3 (in part), [illegible], 13, and 14, and not guilty on charges 1, 3 (in part), 7, 8, 10, 17, on which the [illegible] secutors offered no evidence [illegible] charges 9 and 15. Charges 12 a[illegible] were abandoned.

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[illegible] South Africa, between the [illegible] *Winkfield*, belonging to the Seafield [illegible] Cape with [illegible] South Africa, and the Union mail [illegible] Cape Town homeward bound to [illegible] mails, passengers, and cargo. The *Wink*-[illegible] the *Mexican* sank, but not until all the [illegible] some of the mails and luggage of the [illegible] got on board the other vessel.

[illegible] of the *Mexican* and the [illegible] commenced cross-actions, which [illegible] of the *Winkfield* admitting liability for [illegible] sustained by the *Mexican*, and, the [illegible] having commenced proceedings [illegible] the *Mexican* and all other persons having [illegible] their liability, on July 24, obtained [illegible] of the Merchant Shipping Act, [illegible] in respect of loss of, or damage [illegible] other things to 8*l*. per [illegible] interest) the sum of

[illegible] of the *Mexican*, by [illegible] and by cargo owners, [illegible] amounting to 90,085*l*. 7*s*. 2*d*. [illegible] a claim for 5147*l*. 8*s*. 5*d*. [illegible] the Postmaster-General, on behalf [illegible] General of Cape Colony and [illegible] following items, namely:—

[illegible] value of 282 cases of postal parcels [illegible] the *Mexican*. This claim, [illegible] in respect of its own property, [illegible] the authority of *The Zoe*. (1)

[illegible] the contents of 334 parcels, [illegible] in respect of which the parties [illegible] upon the Postmaster-General, and [illegible] to represent them in these pro-[illegible] was admitted by the registrar on the

(1) [illegible] 372.

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ground of the saving of expense by allowing the Postmaster-General to make a claim instead of separate claims by the parties concerned; but the apportionment of the fund in court amongst the several claimants was postponed pending a motion on behalf of the Postmaster-General in objection to so much of the report of the registrar, dated March 29, 1901, as disallowed—

(3.) A claim of 1706*l.* 19*s.* 4*d.*, the estimated value of the contents of letters and parcels in respect of which no claim had been made by, or instructions received from, the senders or addressees, but which the Postmaster-General undertook to distribute amongst them, and, in order to comply with the terms of a decision in an action in rem in the case of *The Minna* (1), further undertook to indemnify the fund in court against any claims put forward by the actual owners.

On June 10, 1901, the President (Sir F. H. Jeune) overruled the objection, and upheld the decision of the registrar, on the same ground, namely, that the Postmaster-General, as representing the Crown, was not under any liability to the parties interested in the lost letters and parcels included under the third head, and, therefore, was precluded, by the case of *Claridge* v. *South Staffordshire Tramway Co.* (2), from claiming for their value. Costs reserved.

On appeal:—

1901. Nov. 26. *The Attorney-General* (*Sir Robert Finlay, K.C.*), and *Acland*, for the Postmaster-General. In *Claridge* v. *South Staffordshire Tramway Co.* (2) the plaintiff, an auctioneer to whom a horse had been delivered by the owner for sale with liberty to use until sold, brought an action in a county court against the defendants, a tramcar company, for the diminution in value of the horse injured by the negligence of the defendants. The judge directed the jury that the plaintiff as bailee was under no liability to his bailor for the injury to the horse, and therefore could not recover. A Divisional Court, consisting of Hawkins and Wills JJ., affirmed the decision; but in

(1) (1868) L. R. 2 A. & E. 97.

(2) [1892] 1 Q. B. 422.

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Meux v. *Great Eastern Ry. Co.* (1) the late Master of the Rolls (Sir A. L. Smith) said that *Claridge's Case* (2) "may possibly require at some future time further consideration," and it is now submitted that it was wrongly decided.

Chief Justice Holmes, in his lectures on the Common Law (3), traces the origin of the rule as to the right of the bailee to sue to the time when, in the primitive condition of society in England, the arm of the law had to be called in to check the practice of cattle stealing, and it is shewn that the person in actual possession of the cattle at the time they were stolen was of necessity the proper person to follow the trail and institute proceedings for their recovery. The procedure provided by the law turned on the single question whether the plaintiff had lost possession against his will, and was modelled on the self-redress "natural to the case which gave rise to it, (and) was the only remedy. (It) was confined to the man in possession, and was not open to the owner unless he was that man"; in other words, "if chattels were intrusted by their owner to another person, the bailee, and not the bailor, was the proper party to sue for their wrongful appropriation by a third"; and if the bailee "sold or gave the goods in his charge to another, the owner could only look to the bailee and could not sue the stranger . . . . because there was no form of action known which was open to him." Bracton (4) says that one may sue for his chattel as stolen, by the testimony of good men, and that it does not matter whether the thing thus taken was his own property or another's, provided it was in his custody. Holmes C.J. adds: "as the remedies were all in the bailee's hands, it also followed that he was bound to hold his bailor harmless. If the goods were lost, it was no excuse that they were stolen without his fault. He alone could recover the lost property, and therefore he was bound to do so . . . . At first the bailee was answerable to the owner, because he was the only person who could sue; but though this strict liability remained, cause

(1) [1895] 2 Q. B. 387, at p. 394.

(2) [1892] 1 Q. B. 422.

(3) The Common Law, by O. W. Holmes, Jr., (1882) Macmillan & Co. Lecture V. The Bailee at Common Law, pp. 166, 167, 175 to 180.

(4) Fol. 150 b, 151.

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and effect were inverted, and it was said that the bailee could sue because he was answerable to the owner." This liability to the bailor being, however, founded on the remedy the bailee had over against the wrongdoer, it ceased where the remedy ceased, so that in 1455 in an action of debt against the marshal of the Marshalsea (1) for an escape of a prisoner, and the defence was that enemies of the King broke into the prison and carried off the prisoner against the will of the defendant, the Court said that, if alien enemies of the King—for instance, the French—released the prisoner, or perhaps if the burning of the prison gave him a chance to escape, the excuse would be good, "because then (the defendant) has remedy against no one"; but if subjects of the King broke the prison the defendant would be liable, because it is implied that the defendant would have a right of action against them, and therefore would himself be answerable. For a similar reason there was some hesitation as to robbery where the robber was unknown, and so the bailee had no remedy over, and even as to robbery generally, on the ground that by reason of the felony the bailee could not go against either the robber's body or his estate; for the one was hanged and the other forfeited (2); but the bailee was not excused by an ordinary wrongful taking. "If the goods are taken by a trespasser of whom the bailee has conusance, he shall be chargeable to his bailor, and shall have his action over against his trespasser." (3) The principle to be deduced from this reasoning is that, if the bailee parted with the property to another, the owner could not recover it, but must get his indemnity from the bailee—that is to say, the bailee was absolutely responsible for loss, even when happening without his fault, but where he had no remedy he was not answerable.

It may, therefore, be asserted that from time immemorial bailees have been regarded in English law as possessors and entitled to possessory remedies—that is to say, the right of the bailee to bring his action rests, not on his being chargeable over, but as against a wrongdoer, on his possessory title, and

(1) Y. B. 33 Hen. 6, 1, pl. 3.
(2) Y. B. 6 Hen. 7, 12, pl. 9.
(3) Y. B. 3 Hen. 7, 4, pl. 16; see also 10 Hen. 6, 21, pl. 69; 11 Hen. 4, 24 b.

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he recovers on the strength of his possession just as in the case of a finder: *Armory* v. *Delamirie*. (1) This view that the infringement of the possessory right is the true cause of action is established by a long line of authorities.

In *Sutton* v. *Buck* (2), in trover for portions of a wrecked ship, it was held that possession under a general bailment is sufficient title for the plaintiff who was in possession of the ship, but without title as the transfer was void: see also the American case of *Lyle* v. *Barker*. (3) That the infringement of the possessory right was the true cause of action was insisted on in *Rooth* v. *Wilson* (4), a case of agistment, and it was clearly laid down that the right of the bailee in possession to recover against a wrongdoer was the same in case as in trover. Bayley J. there says that "case is a possessory action." So in *Burton* v. *Hughes* (5), where the plaintiff who had borrowed furniture, and was therefore bailee, was nevertheless held entitled to sue the wrongdoer in trover though no title was proved. In *Moore* v. *Robinson* (6) an action of trespass for cutting a rope was successful by the man in charge of a barge. In *Nicolls* v. *Bastard* (7) an action for trover failed because of the want of possession. Parke B. there says that no doubt the bailor may sue as well as the bailee, and "whichever first obtains damages it is a full satisfaction," which must mean the full value in whichever action was first, otherwise the wrongdoer would only have to compensate for one interest, either of which might be but a fractional part of the whole value. In the American case of *White* v. *Webb* (8) it was held that the bailee, as against a stranger, can recover the whole value, any balance, beyond his special property, being held for the owner. See Kent's Commentaries, 12th ed. vol. ii. p. 568, note (*e*). In *Brierly* v. *Kendall* (9), where it was held that the assignor of goods as security for a debt could only

(1) (1722) 1 Stra. 504.
(2) (1810) 2 Taunt. 302, see pp. 308, 309; 11 R. R. 585.
(3) (1813) 5 Binn. 457, at p. 460.
(4) (1817) 1 B. & A. 59, at p. 62; 18 R. R. 431.
(5) (1824) 2 Bing. 173; 27 R. R. 578.
(6) (1831) 2 B. & Ad. 817; 36 R. R. 756.
(7) (1835) 2 C. M. & R. 659, at p. 660.
(8) (1842) 15 Conn. Rep. 302.
(9) (1852) 17 Q. B. 937, at pp. 942, 943.

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recover in trover the value of his interest in the goods seized by the assignee, the dicta of Campbell C.J. are distinctly in favour of the present line of argument. In *Jeffries* v. *Great Western Ry. Co.* (1) it was held immaterial as against the wrongdoer that in an action of trover the plaintiff in possession of trucks had no title, for a person who wrongfully does an injury to a chattel is estopped from alleging that the party in possession of the chattel at the time of the injury done was not the true owner, possession being a good title as against a wrongdoer. So *Waters* v. *Monarch Life Insurance Co.* (2) and *London and North Western Ry. Co.* v. *Glyn* (3) shew that a man may recover more than his interest, and that a warehouseman or a carrier may recover of the insurer the full value, although protected from responsibility for loss by fire. In *Turner* v. *Hardcastle* (4), on the question of damages, the full value was recovered in trover by bailee against wrongdoer.

These authorities demonstrate not only the right of the bailee to maintain an action, but cover also the question of the measure of damages recoverable in such action. The cases cited and the text-writers referred to shew that at a very early stage the bailee was the only person who could sue, and also that he was the person bound to sue because his remedy was exclusive, and it was his duty, therefore, to exert himself for his bailor. Subsequently the rule was misunderstood and based on his liability over, but that inversion of the rule has not prevailed, and though, in later times, the bailor was allowed to sue, that did not take away the right of the bailee, whose possession as against a wrongdoer gave him a complete title to recover the full value, without distinction whether the action was in trespass, trover, or case.

It is submitted, therefore, that the plaintiff in *Claridge's Case* (5), as bailee of a horse to which an injury was done, while in his possession, by a third person, was entitled to recover from the wrongdoer the amount of the depreciation of the horse, notwithstanding that the injury was inflicted under circumstances which imposed no liability upon the plaintiff

(1) (1856) 5 E. & B. 802, at p. 808.
(2) (1856) 5 E. & B. 870.
(3) (1859) 1 E. & E. 652.
(4) (1862) 11 C. B. (N.S.) 683.
(5) [1892] 1 Q. B. 422.

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towards his bailor; and it is similarly submitted that, as between the Postmaster-General and the owners of the *Winkfield*, that is to say, as between possessor and wrongdoer, the person who has possession has the property, and it is not open to the wrongdoer to inquire into the nature or limitation of the right of the possessor; so that the Postmaster-General, as bailee in possession, without regard to the question of his liability over, is entitled to recover, out of the fund which the owners of the *Winkfield* have paid into court, the item amounting to 1706*l.* 19*s.* 4*d.*, or such other sum as the registrar and merchants may find to be due.

Pickford, K.C., and *Lauriston Batten*, for the respondents, cargo claimants. It lies on the appellant to establish that he was bailee in possession; but the letters and parcels at the time of the loss were in the possession of the owners of the carrying ship, and not of the Postmaster-General, whose position was that of forwarding agent. Assuming, however, that he was bailee in possession, the decision in the Court below disallowing his claim was right, for not being a trustee of, or otherwise liable to account to, the senders and addressees, the case falls directly within *Claridge* v. *South Staffordshire Tramway Co.* (1)

Any other view would be fraught with grave inconvenience, for the money recovered in competition with the other claimants on the fund in court would remain in the hands of the Postmaster-General as he is not in a position to distribute it, no claim having been made upon him by the interested parties, nor any authority given him to intervene on their behalf in these proceedings, and by giving the Postmaster-General liberty to put forward this claim two principles of law would be violated, for if an action is held to lie without inquiry as to the rights of the bailor the effect would, in the first place, be to give the Postmaster-General as bailee a right of action for damages which he had not sustained, and, secondly, leave the defendant exposed to another action by the bailor in respect of the same wrong.

(1) [1892] 1 Q. B. 422.

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From an historical point of view also the rule which Holmes C.J. in his work on the Common Law insists upon, namely, that the possession of the bailee was the ground of his right of action, is not accepted by other text-writers. Pollock and Maitland (1) say: "In the days when the actio furti still preserved many of its ancient characteristics, when it began with hue and cry and hot pursuit, it was natural that the bailee, rather than the bailor, should sue the wrongful possessor; but already in the thirteenth century a force was at work which tended to disturb this arrangement"; and they go on to say that it will be found that "the rule that the bailee has the action against the stranger (was) in close connection with a rule that makes the bailee absolutely responsible to the bailor for the safe return of the goods." They then say, with reference to the "rule which equips every bailee with the action against the wrongful taker, and denies that action to the bailor: Perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The bailee had the action because he was liable and was liable because he had the action." Again they say: "In Bracton's text and in the case law of Bracton's day we may see . . . a tendency to require of the bailee who brings an appeal of larceny, or an action of trespass, something more than mere possession, some interest in the thing, some responsibility for its safety. . . . Bracton, f. 103, b. 146, more than once seems to require that the appellor shall complain of a theft of his own goods or of goods for which he has made himself responsible, for which intravit in solutionem erga dominum suum. This phrase is actually used by appellors in 1203." (2) The learned authors here draw attention to the Roman law on the subject by adding "that Bracton is thinking of Justinian's Institutes, iv. 2, § 2, where it is required of the plaintiff in an action bonorum raptorum that he shall have some interest in the thing 'ut intersit ejus non rapi,'" and it would appear that according to the civil law—which has always been followed in

(1) History of English Law, (1895) vol. ii. pp. 169, 170. [In 2nd ed. 1898 the original paging is noted in the margin.]

(2) Select Pleas of the Crown, pl. 88, 126.

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Admiralty where not in conflict with English law—as the Postmaster-General is not liable to account, he has no interest in the preservation of the thing (nec ob id ejus interest rem salvam esse: Just. Inst. iv. 1, § 17), and therefore could not recover.

The correct view would, therefore, seem to be that the right of action to recover the value rested on the liability of the bailee to account to the bailor. Beaumanoir (1), writing in 1283, says that, if a hired thing is stolen, the suit belongs to the bailee, because he is answerable to the person from whom he hired. Similar statements occur again and again in the Year Books. Thus a judge of the Common Bench says in 1410 (2): "If a stranger takes beasts in my custody, I shall have a writ of trespass against him, and shall recover the value of the beasts, because I am chargeable for the beasts to my bailor who has the property"; and Holmes C.J. after referring to this case is obliged to admit that (3) "There are cases in which this reasoning was pushed to the conclusion that if, by the terms of the trust, the bailee was not answerable for the goods if stolen he would not have an action against the thief."

The same explanation of the right of the bailee to sue is, in later times, laid down with precision, as in *Heydon* v. *Smith* (4), where it is said that a bailee "shall recover all in damages because that he is chargeable over." In *Rooth* v. *Wilson* (5), cited on behalf of the appellant, Lord Ellenborough distinctly rested the right of the bailee to recover the value of the chattel on the ground of his liability over to his bailor. In *Swire* v. *Leach* (6), where pledges had been wrongfully taken in distress by the landlord of a pawnbroker, Erle C.J. lays stress on the liability of the bailee to account to the bailor, for the right of the bailee to the full value rests on his liability for the safe custody of the property of the bailor—that is, "his damages

(1) XXXI. 16.

(2) Y. B. 11 Hen. 4, 24 b. See further Y. B. 3 Hen. 7, 4, pl. 16; 20 Hen. 7, 1, pl. 1; 21 Hen. 7, 14, pl. 23; 8 Edw. 4, 6, pl. 5; 9 Edw. 4, 34, pl. 9.

(3) Holmes on the Common Law, p. 170.

(4) (1611) 13 Rep. 67 at f. 69: see Vin. Abr. Trespass, M. 7. See also Roll. Abr. Trespass, M. 2; Bac. Abr. Trespass (C) 655.

(5) 1 B. & A. 59.

(6) (1865) 18 C. B. (N.S.) 479, at p. 486.

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against the stranger will be the entire value of the thing if he is liable over to the owner": Mayne on Damages, 6th ed. (1899) p. 416. There does not appear to be any case where the bailee has not been liable over and yet has recovered the whole value. In the cases cited by the appellant the liability of the bailee to the bailor is assumed. In the majority of those cases the question of the measure of damage did not arise, and the American cases cited in favour of the appellant are not binding on this Court. Where the question of damage has been dealt with in actions of trespass the measure has been the loss sustained by the bailee, not the full value, and in order to obtain the full value from a wrongdoer in an action by the bailee the obligation to account must arise before judgment, otherwise the bailee can only recover the actual amount of loss which he has sustained; and in the present case it is admitted that the Postmaster-General as bailee has not sustained any damage.

[They also referred to *Dockwray* v. *Dickenson* (1); *Addison* v. *Overend* (2); Beven on Negligence in Law, 2nd ed. vol. ii. pp. 884 to 886, and notes; Clerk and Lindsell on Torts, (1896) pp. 234 to 238.]

The Attorney-General, in reply. The argument of the respondents based on the Year Books may be dealt with by quoting a passage from Holmes C.J.'s lectures on the Common Law, p. 170. Bearing in mind, he says, "the inverted explanation of Beaumanoir that the bailee could sue because he was answerable over, in place of the original rule, that he was answerable over so strictly because only he could sue, we find the same reasoning often repeated in the Year Books, and, indeed, from that day to this, it has always been one of the commonplaces of the law."

No doubt there is some hesitation in the expression of opinion by Pollock and Maitland, in their History of English Law, as to the priority of the rule that gives the action to the bailee, but they seem to be in substantial agreement with Holmes C.J., for at p. 169, vol. ii., they say: "Now it would

(1) (1696) Skin. 640. (2) (1796) 6 T. R. 766; 34 R. R. 775.

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seem that if goods were unlawfully taken from the possession of the bailee, it was he that had the action against the wrongdoer; it was for him to bring the appeal of larceny or the action of trespass," and, after quoting from Bracton, f. 151, as to the question being one of possession only, "Et non refert utrum res quæ ita subtracta fuit, extiterit illius appellantis propria vel alterius, dum tamen de custodia sua," they say, "and having thus given the action to the bailee we must in all probability deny it to the bailor"; and at p. 171, with reference to this proposition they add: "We can hardly doubt that this is the starting point of our Common Law."

It has been contended on behalf of the respondents that to allow either the bailee or the bailor to sue is not reasonable, and that the bailee's right should be restricted to his interest; but Parke B. lays it down clearly in *Nicolls* v. *Bastard* (1), that the bailee suing first can obtain full satisfaction, and by so doing ousts the bailor of his remedy.

Christopher Head, for the owners of the *Winkfield*.

Scrutton, K.C., watched the appeal on behalf of the owners of the *Mexican*.

Cur. adv. vult.

Dec. 16. COLLINS M.R. This is an appeal from the order of Sir Francis Jeune dismissing a motion made on behalf of the Postmaster-General in the case of *The Winkfield*.

The question arises out of a collision which occurred on April 5, 1900, between the steamship *Mexican* and the steamship *Winkfield*, and which resulted in the loss of the former with a portion of the mails which she was carrying at the time.

The owners of the *Winkfield* under a decree limiting liability to 32,514*l.* 17*s.* 10*d.* paid that amount into court, and the claim in question was one by the Postmaster-General on behalf of himself and the Postmasters-General of Cape Colony and Natal to recover out of that sum the value of letters, parcels, &c., in his custody as bailee and lost on board the *Mexican*.

The case was dealt with by all parties in the Court below as a claim by a bailee who was under no liability to his bailor for

(1) 2 C. M. & R. 659.

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the loss in question, as to which it was admitted that the authority of *Claridge* v. *South Staffordshire Tramway Co.* (1) was conclusive, and the President accordingly, without argument and in deference to that authority, dismissed the claim. The Postmaster-General now appeals.

The question for decision, therefore, is whether *Claridge's Case* (1) was well decided. I emphasize this because it disposes of a point which was faintly suggested by the respondents, and which, if good, would distinguish *Claridge's Case* (1), namely, that the applicant was not himself in actual occupation of the things bailed at the time of the loss. This point was not taken below, and having regard to the course followed by all parties on the hearing of the motion, I think it is not open to the respondents to make it now, and I therefore deal with the case upon the footing upon which it was dealt with on the motion, namely, that it is covered by *Claridge's Case*. (1) I assume, therefore, that the subject-matter of the bailment was in the custody of the Postmaster-General as bailee at the time of the accident. For the reasons which I am about to state I am of opinion that *Claridge's Case* (1) was wrongly decided, and that the law is that in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed.

It seems to me that the position, that possession is good against a wrongdoer and that the latter cannot set up the jus tertii unless he claims under it, is well established in our law, and really concludes this case against the respondents. As I shall shew presently, a long series of authorities establishes this in actions of trover and trespass at the suit of a possessor. And the principle being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of the defendant. I think it involves this also, that the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and

(1) [1892] 1 Q. B. 422.

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must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor.

I think this position is well established in our law, though it may be that reasons for its existence have been given in some of the cases which are not quite satisfactory. I think also that the obligation of the bailee to the bailor to account for what he has received in respect of the destruction or conversion of the thing bailed has been admitted so often in decided cases that it cannot now be questioned; and, further, I think it can be shewn that the right of the bailee to recover cannot be rested on the ground suggested in some of the cases, namely, that he was liable over to the bailor for the loss of the goods converted or destroyed. It cannot be denied that since the case of *Armory* v. *Delamirie* (1), not to mention earlier cases from the Year Books onward, a mere finder may recover against a wrongdoer the full value of the thing converted. That decision involves the principle that as between possessor and wrongdoer the presumption of law is, in the words of Lord Campbell in *Jeffries* v. *Great Western Ry. Co.* (2), "that the person who has possession has the property." In the same case he says (3): "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by shewing that there was title in some third person, for *against a wrongdoer possession is title.* The law is so stated by the very learned annotator in his note to *Wilbraham* v. *Snow.*" (4) Therefore it is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all; and, therefore, as between those two parties full damages have to be paid without any further inquiry. The extent of the liability of the finder to the true owner not being relevant to the discussion between him and

(1) 1 Stra. 504.
(2) 5 E. & B. 802, at p. 806.
(3) 5 E. & B. 802, at p. 805.
(4) 2 Wms. Saund. 47 f.

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the wrongdoer, the facts which would ascertain it would not have been admissible in evidence, and therefore the right of the finder to recover full damages cannot be made to depend upon the extent of his liability over to the true owner. To hold otherwise would, it seems to me, be in effect to permit a wrongdoer to set up a jus tertii under which he cannot claim. But, if this be the fact in the case of a finder, why should it not be equally the fact in the case of a bailee? Why, as against a wrongdoer, should the nature of the plaintiff's interest in the thing converted be any more relevant to the inquiry, and therefore admissible in evidence, than in the case of a finder? It seems to me that neither in one case nor the other ought it to be competent for the defendant to go into evidence on that matter.

I think this view is borne out by authority; for instance, in *Burton* v. *Hughes* (1) the plaintiff, who had borrowed furniture, and was therefore bailee, was held to be entitled to sue in trover wrongdoers who had seized it without giving in evidence the written agreement under which he held it. The point made for the defendant was that "the qualified interest having been obtained under a written agreement could not be proved except by the production of that agreement duly stamped." The argument on the other side was "that the existence of some kind of interest having been established the precise nature of it or the terms upon which it was acquired were immaterial to the support of this action." Best C.J. in delivering judgment says: "If this had been a case between Kitchen and the plaintiff the agreement ought to have been produced, because that alone could decide the respective rights of those two parties; but it appears that Kitchen was to supply the plaintiff with furniture, and the question is whether, after he had obtained it, he had a sufficient interest to maintain this action. The case which has been referred to—*Sutton* v. *Buck* (2)—confirms what I had esteemed to be the law upon the subject, namely, that a simple bailee has a sufficient interest to sue in trover." By holding, therefore, that the agreement defining the conditions of the plaintiffs' interest was immaterial the Court in effect decided that the right of the bailee, in

(1) 2 Bing. 173; 27 R. R. 578. (2) 2 Taunt. 302; 11 R. R. 585.

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possession, to sue could not depend upon the fact or extent of his liability over to the bailor, since the plaintiff was allowed to keep his verdict in trover, the agreement defining his interest and liability being excluded from the discussion. In *Sutton* v. *Buck* (1), on the authority of which this case was decided, it was held that possession under a general bailment is sufficient title for the plaintiff in trover. The plaintiff had taken possession of a stranded ship under a transfer void for non-compliance with the Register Acts, and he sued the defendant in trover for portions of the timber, wood, and materials of which the defendant had wrongfully taken possession. Sir James Mansfield C.J. had non-suited the plaintiff, on the ground that the transfer was defective without registration. On motion the non-suit was set aside, Sir James Mansfield being a member of the Court, and a new trial ordered on the ground that the plaintiff had sufficient possession to maintain the action against the wrongdoer. It is true that Chambre J. reserved his opinion as to the measure of damages, but on the new trial the plaintiff recovered a verdict apparently for the full value of the things converted, and on further motion for a new trial the only point argued was that the defendant was justified as lord of the manor in doing what he did—a contention which was rejected by the Court.

In *Swire* v. *Leach* (2) a pawnbroker, whose landlord had wrongfully taken in distress pledges in the custody of the pawnbroker, was held entitled to recover in an action against the landlord for conversion the full value of the pledges. This case was decided by a strong Court, consisting of Erle C.J., Williams and Keating JJ., and has never, so far as I know, been questioned since. The duty of the bailee to account to the bailor was recognised as well established. See also *Turner* v. *Hardcastle* (3), a considered judgment of the Court of Common Pleas, which included Willes J., who had not been a party to *Swire* v. *Leach* (2), and where the bailee's right to recover full damages and his obligation to account to the bailor is again affirmed.

(1) 2 Taunt. 302; 11 R. R. 585. (2) 18 C. B. (N.S.) 479.
(3) 11 C. B. (N.S.) 683.

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The ground of the decision in *Claridge's Case* (1) was that the plaintiff in that case, being under no liability to his bailor, could recover no damages, and though for the reasons I have already given I think this position is untenable, it is necessary to follow it out a little further. There is no doubt that the reason given in *Heydon and Smith's Case* (2)—and itself drawn from the Year Books—has been repeated in many subsequent cases. The words are these: "Clearly, the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages because that he is chargeable over."

It is now well established that the bailee is accountable, as stated in the passage cited and repeated in many subsequent cases. But whether the obligation to account was a condition of his right to sue, or only an incident arising upon his recovery of damages, is a very different question, though it was easy to confound one view with the other.

Holmes C.J. in his admirable lectures on the Common Law, in the chapter devoted to bailments, traces the origin of the bailee's right to sue and recover the whole value of chattels converted, and arrives at the clear conclusion that the bailee's obligation to account arose from the fact that he was originally the only person who could sue, though afterwards by an extension, not perhaps quite logical, the right to sue was conceded to the bailor also. He says at p. 167: "At first the bailee was answerable to the owner because he was the only person who could sue; now it was said he could sue because he was answerable to the owner." And again at p. 170: "The inverted explanation of Beaumanoir will be remembered, that the bailee could sue because he was answerable over, in place of the original rule that he was answerable over so strictly because only he could sue." This inversion, as he points out, is traceable through the Year Books, and has survived into modern times, though, as he shews, it has not been acted upon. Pollock and Maitland's History of English Law, vol. 2, p. 170, puts the position thus:—"Perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The

(1) [1892] 1 Q. B. 422. (2) 13 Rep. 69.

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bailee had the action because he was liable, and was liable because he had the action." It may be that in early times the obligation of the bailee to the bailor was absolute, that is to say, he was an insurer. But long after the decision of *Coggs* v. *Bernard* (1), which classified the obligations of bailees, the bailee has, nevertheless, been allowed to recover full damages against a wrongdoer, where the facts would have afforded a complete answer for him against his bailor. The cases above cited are instances of this. In each of them the bailee would have had a good answer to an action by his bailor; for in none of them was it suggested that the act of the wrongdoer was traceable to negligence on the part of the bailee. I think, therefore, that the statement drawn, as I have said, from the Year Books may be explained, as Holmes C.J. explains it, but whether that be the true view of it or not, it is clear that it has not been treated as law in our Courts. Upon this, before the decision in *Claridge's Case* (2), there was a strong body of opinion in text-books, English and American, in favour of the bailee's unqualified right to sue the wrongdoer: see Mayne on Damages, 4th ed. p. 381, and cases there cited; Sedgwick on Damages, 7th ed. vol. 1, p. 61, n. (*a*); Story on Bailments, 9th ed. s. 352; Kent's Commentaries, 12th ed. vol. 2, p. 568, n. (*e*); Pollock on Torts, 6th ed. pp. 354, 355; Addison on Torts, 7th ed. p. 523; and as I have already pointed out, Williams J., the editor of Williams' Saunders, was a party to the decision of *Swire* v. *Leach*. (3) The bailee's right to recover has been affirmed in several American cases entirely without reference to the extent of the bailee's liability to the bailor for the tort, though his obligation to account is admitted—see them referred to in the passages cited, and in particular see *Ullman* v. *Barnard* (4); *Parish* v. *Wheeler* (5); *White* v. *Webb*. (6) The case of *Rooth* v. *Wilson* (7) is a clear authority that the right of the bailee in possession to recover against a wrongdoer is the same in an action on the case as in

(1) (1704) 2 Ld. Raym. 909.
(2) [1892] 1 Q. B. 422.
(3) 18 C. B. (N.S.) 479. [See also Mr. Justice Wright in Pollock and Wright on Possession, p. 166.]
(4) (1856) 73 Mass. Rep. 554.
(5) (1860) 22 New York Rep. 494.
(6) 15 Conn. Rep. 302.
(7) 1 B. & A. 59.

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an action of trover, if indeed authority were required for what seems obvious in point of principle. There the gratuitous bailee of a horse was held entitled to recover the full value of the horse in an action on the case against a defendant by whose negligence the horse fell and was killed. The case was decided by Lord Ellenborough C.J., Bayley, Abbott, and Holroyd JJ. The three latter seem to me to put it wholly on the ground that the plaintiff was in possession and the defendant a wrongdoer. Abbott J. says shortly:—"I think that the same possession which would enable the plaintiff to maintain trespass would enable him to maintain this action"; and Bayley J. points out that case is a possessory action. But Lord Ellenborough undoubtedly rests his judgment on the view that the plaintiff would himself have been responsible in damages to his bailor to a commensurate amount. This, no doubt, was his personal view, but it was not the decision of the Court, and, as I have pointed out, it has certainly not been acted upon in subsequent cases. Therefore, as I said at the outset, and as I think I have now shewn by authority, the root principle of the whole discussion is that, as against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not ad rem in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed. There is no inconsistency between the two positions; the one is the complement of the other. As between bailee and stranger possession gives title—that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its

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equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor. See Com. Dig. Trespass B. 4, citing Roll. 551, l. 31, 569, l. 22, Story on Bailments, 9th ed. s. 352, and the numerous authorities there cited.

The liability by the bailee to account is also well established—see the passage from Lord Coke, and the cases cited in the earlier part of this judgment—and therefore it seems to me that there is no such preponderance of convenience in favour of limiting the right of the bailee as to make it desirable, much less obligatory, upon us to modify the law as it rested upon the authorities antecedent to *Claridge's Case*. (1) I am aware that in two able text-books, Beven's Negligence in Law and Clerk and Lindsell on Torts, the decision in *Claridge's Case* (1) is approved, though it is there pointed out that the authorities bearing the other way were not fully considered. The reasons, however, which they give for their opinions seem to be largely based upon the supposed inconvenience of the opposite view; nor are the arguments by which they distinguish the position of bailees from that of other possessors to my mind satisfactory. *Claridge's Case* (1) was treated as open to question by the late Master of the Rolls in *Meux* v. *Great Eastern Ry. Co.* (2), and, with the greatest deference to the eminent judges who decided it, it seems to me that it cannot be supported. It seems to have been argued before them upon very scanty materials. Before us the whole subject has been elaborately discussed, and all, or nearly all, the authorities brought before us in historical sequence.

STIRLING and MATHEW L.JJ. concurred.

Appeal allowed.

On the question of costs *The Empusa* (3) was cited by counsel for the owners of the *Winkfield*, and *The Black Prince* (4) by counsel for the Postmaster-General.

(1) [1892] 1 Q. B. 422.
(2) [1895] 2 Q. B. 387.
(3) (1879) 5 P. D. 6.
(4) (1862) Lush. 568.

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Dec. 19. The case was mentioned again on this question.

COLLINS M.R. The costs of the appeal of the Postmaster-General must be paid by the respondents. No order as to costs in respect of the owners of the *Mexican* or of the *Winkfield*. The costs in the Court below will be dealt with by the President. (1)

Solicitor for appellant, the Postmaster-General: *Solicitor to the Post Office.*

Solicitors for respondents, owners of cargo on the *Mexican*, and for the owners of the *Winkfield*: *Thomas Cooper & Co.*

Solicitors for the owners of the *Mexican*: *Botterell & Roche.*

T. L. M.

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BIRCH *v.* BIRCH AND OTHERS.

Probate—Action for Revocation on Ground of Fraud—Staying Proceedings—Res Judicata—Person charged with Fraud not a Party to former Proceedings.

If any person who is interested, directly or indirectly, in the establishment of a testamentary document is guilty of a fraud in putting forward that document for probate, this fraud affects the whole litigation. Where, therefore, the plaintiff, in an action against executors, claimed, on the ground of fraud, to revoke a probate granted in solemn form, and the defendants moved to dismiss the action as res judicata, the Court refused to stay the proceedings, although it was not suggested that the executors, to whom probate had been granted, were cognizant of the alleged fraud, and although the person, against whom the plaintiff now made the charges, was not a party to the former suit.

MOTION by defendants in a probate action to stay the proceedings and dismiss the action as being res judicata.

The plaintiff was defendant in a former suit, in which the will, probate of which he now sought to revoke, was decreed to have been proved in solemn form of law.

The ground of revocation relied upon by the plaintiff was fraud, which he imputed to a person who was instrumental in obtaining the will, but who was not a party to the former

(1) The President subsequently directed that each party should bear his own costs.

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proceedings. The wife of the person now charged with fraud was a beneficiary under the will and a party to those proceedings.

The material facts and dates appear in the judgment.

Bargrave Deane, K.C., and *R. H. Pritchard*, for some of the defendants. This is not the proper tribunal to deal with the present application, which is practically for the revocation of the probate in solemn form granted by the President: *Flower* v. *Lloyd.* (1) If the persons here charged have been guilty of the offences alleged, they ought to be proceeded against in a criminal court. There might be some ground for the application if either of the persons charged had been a party to the former proceedings in this Court. The plaintiff, if he wishes to obtain redress in a civil court, should go to the Chancery Division, as was done in *Priestman* v. *Thomas* (2), and in the earlier case of *Barnsly* v. *Powel.* (3)

[GORELL BARNES J. This is a branch of the High Court now equally with the Chancery Division.]

Inderwick, K.C., and *Willock*, for Walter George Birch, the plaintiff. The plaintiff after the decision in the former suit could not appeal to the Court of Appeal, for he was not in a position to impeach the judgment of the President upon the evidence before him. It is not alleged that the two executors were parties to any fraud, but the plaintiff will contend that the case innocently put forward by them at the hearing was in fact procured by fraud. That is the substance of the statement of claim, which can be verified by affidavit if the Court desires. The reason for bringing the action in this Court is that all the documents are here.

[GORELL BARNES J. There is nothing at the present day in the point that this is not the right Court.]

This action is clearly maintainable: *Flower* v. *Lloyd* (1); *Cole* v. *Langford* (4), in which *Priestman* v. *Thomas* (2) was referred to; *Wyatt* v. *Palmer.* (5) The person chiefly implicated in the fraud is interested in the property passing

(1) (1877) 6 Ch. D. 297; (1878, 1879) 10 Ch. D. 327.
(2) (1884) 9 P. D. 70, 210.
(3) (1749) 1 Ves. Sen. 287.
(4) [1898] 2 Q. B. 36.
(5) [1899] 2 Q. B. 106.